No. 15219

In the United States Court of Appeals for the Ninth Circuit

CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; AND EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
Seattle, Washington,
JOHN A. ROBERTS, JR.,
Assistant United States Attorney,
Seattle, Washington,
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice, Washington, D. C.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 15219

CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; AND EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE, APPELLANTS.

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. An oral decision of the district court on September 7, 1955, as transcribed by the court reporter, is set out in the Appendix, *infra,* pp. 36–40. Findings of fact and conclusions of law by the district court appear in the record at pages 62–81, 107–113.

JURISDICTION

These are appeals from an order entered by the district court on April 26, 1956 (R. 114–117). The jurisdiction of the district court was invoked by the United States under 28 U. S. C. sec. 1345 (R. 3). A motion to alter or amend the judgment and decree filed May 7, 1956, was denied June 4, 1956 (R. 118–119). Appellants' notices of appeal were filed on June 27, 1956, and July 31, 1956 (R. 120–121). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether, in view of the fact that appellants knowingly violated statutory and contractual rights of the United States, the district court erred in requiring the appellants to account for the profits derived by them as a result of their wrongdoing.

2. Whether the damages awarded in lieu of specific performance were excessive.

3. Whether the findings by the district court are clearly erroneous.

STATEMENT

On October 4, 1954, the United States filed its complaint seeking redress for the violation of its rights growing out of the failure of the appellants to remove temporary war housing from lands held for the exclusive use of the United States (R. 3–22). The material facts may be summarized as follows:

By condemnation proceedings instituted during World War II the United States acquired exclusive temporary use of land in Seattle for a temporary

housing project. Such a project [WASH–45302] was constructed under the authority of the Lanham Act, 54 Stat. 1125, 42 U. S. C. sec. 1521 *et seq.* The Government's term for the use of the land was extended through June 30, 1956. The district court took judicial notice of all the proceedings and files in the condemnation action[1] (Fdg. II, R. 63–64).

By amendments to the Lanham Act, Congress directed that "the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character * * *" (64 Stat. 48, 64, 72–73). In order to comply with this congressional mandate the Administrator of the Public Housing Administration, through the Housing Authority of the City of Seattle, issued public invitations for bids for the sale and removal of 10 temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate site (Fdg. I, R. 62–63).

Mr. A. E. Sherman, at the request of appellant Virgil J. Pague, submitted a bid. Sherman "was a man of small means while he, Pague, had substantial assets, so that in the event of any subsequent trouble concerning said buildings, the financial assets of the said Virgil J. Pague would be protected" (Fdg. IV, R. 65). Sherman's bid was accepted. On paying the balance of the purchase price, Sherman advised Louis

---

[1] The condemnation proceedings are entitled *United States* v. *Certain parcels of land in King County, Washington, et al.*, Civil No. 1143, United States District Court for the Western District of Washington, Northern Division.

Michaelson of the Housing Authority of the City of Seattle that the payment was tendered on behalf of the Century Investment Corporation, then in the preliminary stages of organization, and to which Sherman assigned his interest in the bid. Virgil J. Pague was an incorporator and became president of Century and the contract was prepared in its name (Fdgs. III, IV, V; R. 64–66).

On July 14, 1953, the contract for the sale and removal of the buildings was executed by the contracting officer of the Public Housing Administration and was thereafter delivered to Century. Details of its incorporation were completed by Century on July 17, 1953, and thereafter it entered upon the work of selling and removing houses (Fdg. VI, R. 66).

On and after August 21, 1953, appellant Century Investment Corporation purported to convey four of the buildings in the project (Bldgs. 102, 103, 104, and 105, comprising 54 dwelling units) without imposing the condition or obligation that they be removed from site.[2] Those buildings remain on the site and are being used for private commercial dwelling purposes (Fdg. X, R. 68). Buildings 102 and 103 were purportedly acquired by appellant Virgil J. Pague from Century on August 21, 1953, and October 5, 1953, respectively. Thereafter Virgil J. Pague acquired an interest in the lots upon which buildings 102 and 103 were situ-

[2] Paragraph 8 of the general conditions of the contract here involved provides (R. 17):

"8. *Assignment.* Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U. S. C. 15.)"

ated. Building 104 was purportedly acquired by appellants Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, in two parts, to wit; one portion from R. M. Scougal and F. T. Crow, who acquired same from Century on September 2, 1953, the remainder of the building being acquired from Virgil J. Pague and his brother, Carl W. Pague, who had acquired same from Century. Carl W. Pague possessed no real interest in the building. On January 20, 1954, appellants Barnett and Owens and wives jointly acquired an interest in the lots underlying building 104. Building 105 was purportedly acquired by appellants Edward R. Ester and wife in November 1953[3] from Carl W. Pague, who had acquired the same from Century. Thereafter appellant Ester acquired an interest in the lots underlying building 105 (Fdg. XI, R. 68–70).

The lots underlying the buildings here involved are among the parcels of real estate the use of which was taken by the condemnation proceedings referred to previously (*supra,* pp. 2–3). None of the appellants herein possessed an interest in said lands at the commencement of those proceedings, they having acquired their respective interests after the date of the contract with Century for the sale and removal of the buildings. By the Declaration of Taking filed in the condemnation proceedings on June 15, 1945, and the judgment entered therein on June 16, 1945, and by subsequent Judgments Fixing Compensation entered in that action, the United States was granted the

[3] The Findings of Fact mistakenly show this date as 1954 (R. 70, but see R. 27).

right to renew its exclusive use without the consent of the owners of the land from year to year, not to exceed three years after the termination of the National Emergency declared to exist by presidential proclamation of September 8, 1939 (54 Stat. 2643). The Government filed timely notice, yearly, of its intention to renew its exclusive use extending to February 21, 1956 (Fdg. XII, R. 70–71).[4]

The Housing Authority of the City of Seattle and Louis Michaelson, its employee, were granted limited authority by the Public Housing Administration to attend to administrative details concerning the sale of the project (Fdg. VII, R. 67). All of the appellants who dealt with the Housing Authority of the City of Seattle at the time the contract was made knew that that organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America (Fdg. VIII. R. 67).

On or about November 12, 1954—the contract expiration date for removal of the buildings and clearance of the sites—Century importuned the Seattle Housing Authority for an extension of 60 days therefor (Pl. Exh. 9, *infra,* p. 41; Fdg. IX, R. 67). The Acting Executive Director of the Seattle Housing Authority purported to extend the time to January 15, 1954 (Pl. Exh. 10, *infra,* p. 42; Fdg. IX, 67).[5]

[4] The Government further extended its exclusive use for another yearly period to February 21, 1957, but subsequently terminated its use as of June 30, 1956.

[5] While the Seattle Housing Authority purported to extend the time for performance, the district court concluded that "there never was any general agency from the plaintiff to said organiza-

Appellants Century Investment Corporation and Virgil J. Pague, its president, of course, had full knowledge of the contract provision for the removal of the buildings. Appellants Arthur G. Barnett and wife, Donald F. Owens and wife, and Edward R. Ester and wife all had "full and complete knowledge" of the removal contract and they were not innocent purchasers for value (Fdgs. XIII, XIV; Concl. X; R. 71–72, 77–78).

Each of the appellants herein who now assert ownership of the buildings in question (Fdg. XV, R. 72–73):

> before acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff [United States], inquired of the said Louis Michaelson and endeavored to secure through him some express waiver of said contract obligation; that such a waiver was never obtained by any one or more of said defendants; that they, and each of them, after purporting to acquire their respec-

---

tion [Housing Authority of the City of Seattle] or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract" (Concl. V, R. 75). In this connection, the Public Housing Administration has advised: "There is no justification nor consideration for such an extension. The Seattle Housing Authority was not the agent of this Administration for that purpose. It was not a party to the Removal Contract." Determination of this matter is not required on these appeals.

414840—57——2

> tive interests, and in an effort to secure an express waiver of said contract obligation, secured a resolution of the City of Seattle, Washington, whereby that municipality permitted said buildings to remain on site for a period of five (5) years, and by action of the Seattle Board of Public Works defendants [appellants] now have, and plaintiff does not have and since Oct. 28, 1953 has not had, the use of the street area underlying said buildings, defendants having been granted said street use Dec. 9, 1953. Each of said buildings have by defendants been altered so as to comply with the City Code requirements.

The buildings not having been removed, the present action was instituted. The relief sought was (1) to require Century and its surety to proceed with the removal of the temporary buildings in accordance with the contractor's obligations and the mandatory requirement of the Lanham Act, (2) to restrain any interference with the Government's interest in the property, (3) for damages for the breach of contract, (4) for an accounting, (5) for reasonable rental for use of the buildings, (6) for forfeiture of the title of the defendants and declaration of the title of the United States free from all claims, and (7) for appropriate further relief (R. 8–10).

After a trial, an oral decision (*infra,* pp. 36–40) was made by the district court in favor of the United States. On October 20, 1955, findings of fact and conclusions of law were entered (R. 62–81). The court there found facts substantially as outlined above and reached conclusions warranting the relief sought.

On the occasion of delivering its oral decision, the court had announced its desire for further information concerning the question of the amount of damages to be awarded for the violations of the Government's rights (Oral decision, *infra,* p. 39). The court determined that since there was evidence that appellants made commercial use of the buildings, and such commercial use was carried on by the appellants from the site from which they were obligated to remove the buildings during the period complained of, an accounting was in order (*ibid., infra,* pp. 39–40). Accordingly, the district court referred the case to a Special Master (Don S. Griffith, a practicing certified public accountant) for that purpose (R. 82–83). After hearings and the submission of evidence, income received by the appellants from the rental units, less the normal operating expenses, was determined by the Special Master who filed a report and supplemental report embodying his findings and conclusions.[6] Various exceptions were filed to these reports (R. 91–105).

On April 26, 1956, after noting that it had "heretofore entered an Order approving and confirming the supplemental report of Special Master, filed herein on January 18, 1956," the district court went on to make supplemental and amendatory findings of fact and conclusions of law (R. 107–113). In doing so, the court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance. To aid in an understanding

[6] Portions of those reports appear in the printed record at pp. 84–91.

of the district court's supplemental and amendatory findings and conclusions, a brief explanation becomes necessary of the judgments entered in the condemnation proceedings (Civil No. 1143) under which the Government acquired its exclusive use of the land underlying the buildings. The judgments there entered required the payment of certain specific rental payments "together with an amount equal to general real estate taxes lawfully levied and assessed" against the parcels in question. The administrative practice had been for the taxpayers to pay the taxes and then submit their tax statements to the Public Housing Administration for reimbursement. Deposits were not made in advance to cover the estimated amount of these taxes. The purchasers of the underlying lands here involved did not submit their tax statements and so were not reimbursed for the amount of the taxes. Apparently in order to avoid the forced removal of the buildings (which had been improved to meet the code requirements of the City of Seattle (*supra,* p. 8)), the district court apparently used the tax matter discussed above as justification for awarding damages only rather than ordering specific performance of the contract as it had previously determined.

Accordingly, after finding that it was incumbent upon the Government to prove its exclusive right of possession of the land upon which the buildings were situated and that the Government "has not proved that the future ascertainable installments of such just compensation have been paid" (Supp'l Fdgs. I, II;

R. 107–108), the court went on to find (Supp'l. Fdg. III, R. 108–109):

> That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1, 1956, and the plaintiff has no present intention of renewing or extending said estate by virtue of any existing judgment or order of this Court; that upon that date, the defendants, so far as existing judgments and orders of court are concerned, will be entitled to the exclusive possession of said real estate, and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this Court's previous contemplated order of building removal and site clearance. The Court finds that within about seventy (70) days of April 21, 1956, the defendants would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; that from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale.

The district court then went on to find the amounts of damages to which the Government was entitled[7]

---

[7] $5,937.13 for Buildings 102 and 103 against Virgil J. Pague and Century Corporation. $3,709.31 for Building 104 against

and the fee to be paid the Special Master (R. 109–111) and to make its supplemental and amendatory conclusions of law (R. 111–113). The earlier findings of fact and conclusions of law were "reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein" (Supp'l Fdg. VII, R. 110).

The district court's judgment and decree was also entered on April 26, 1956 (R. 114–115). A motion to alter or amend the judgment and decree was denied (R. 118–119). These appeals followed.

SUMMARY OF ARGUMENT

1. There is a clear basis for requiring the appellants to account for the profits derived from the buildings here involved. Both under the law and by express contract provision the buildings were required to be removed from the sites upon which they were situated. *All* of the appellants had knowledge of the removal requirement and knowingly violated it. Under long-established equitable principles one is not permitted to derive a benefit from his own breach of duty and obligation or to enjoy, unmolested, property the possession of which was acquired by his wrongful acts. A court has broad discretion in exercising its equitable powers. There were wrongs by the appellants and the remedy accorded by the court below in the exercise of its equity jurisdiction should not be disturbed unless it should be decided that specific

---

Barnett and wife, Owens and wife, and Century Corporation. $2,432.59 for Building 105 against Ester and wife and Century Corporation. Each award was against the named parties, jointly and severally (R. 68–70, 109–111).

relief by directing removal of the buildings is more appropriate.

2. The damages awarded by the court below in lieu of specific performance were not excessive. As a matter of fact, the awards by the district court are exceptionally fair to the appellants in that there is not included in them a number of items of damages to the United States which were caused solely as a result of the appellants wrongdoing.

3. The findings by the district court are not clearly erroneous so as to warrant being disturbed on appeal.

ARGUMENT

Introductory: While a brief has been filed by appellants Century Investment Corporation and Virgil J. Pague (referred to herein as Century Br. —) and a separate brief has been filed on behalf of appellants Arthur G. Barnett, Donald F. Owens, Edward R. Ester and their wives (referred to herein as Barnett Br. —), the Government sees no need to burden this Court with two briefs for the United States. Accordingly, arguments advanced in both briefs filed on behalf of the various appellants will be treated herein.

I. There was a clear breach of contract by Century such as would justify equity compulsion to remove the buildings, which was denied and the remedy of damages substituted, only because of subsequent events; and appellants Pague, Barnett, Owens, and Ester had knowledge of, and participated in, those breaches

The appellants contend that there is no basis for requiring them to account for profits derived from the buildings here involved. They argue that the only measure of damages is the fair rental value of the real

estate and that that item is fixed as the amount the Government paid annually for use of the land. They contend that the sale of the buildings was absolute; that any accounting of profits is unwarranted; that the accounting as determined by the Special Master is arbitrary and capricious, etc. But as indicated in the heading to this point, there is ample justification for the judgment entered by the district court.

Under Section 604 of the Lanham Act (64 Stat. 48, 64) and Executive Order 10339 (17 F. R. 3012), extending the date, the Public Housing Administration is required to remove, by demolition or otherwise, all dwelling structures comprising this temporary housing project as soon as practicable after July 1, 1954. It was to accomplish the congressional mandate that the Public Housing Administration entered into the contract involved in this suit. The Government did not invoke the remedy of an action at law since recovery of damages would not comply with the direction of Congress that the buildings be removed. Also, the Government had been obliged to expend money to renew its use and occupancy of the land for an additional year, and was facing the possibility (which did eventuate) of further renewals because of the failure of Century to complete its contract. Equitable relief was the appropriate answer and, accordingly, the Government filed the instant action.

The appellants' arguments completely overlook the nature of the litigation, the powers of a court to accord equitable relief, and their own position in this case. In defiance of the law and the public policy inherent in the Lanham Act and the contract which was

executed pursuant thereto, the appellants proceeded with their plan to convert into permanent housing what was temporary housing and to rent the houses at a profit.[8] In the words of the district court with reference to the contract here involved (R. 75):

[8] The buildings here involved were constructed for temporary war housing (R. 63, 76). As indicated, Congress expressly directed that such housing be removed "by demolition or otherwise." Lanham Act, Secs. 313, 604, 54 Stat. 1125, as amended, 64 Stat. 48, 64, 72–73. The legislative history makes clear the policy of Congress to avoid any charge against the Federal Government that by leaving temporary housing projects around the country it created slums, presented personal injury hazards, depressed land values, etc. For example, in discussing the bill in which Sec. 313 was offered as an amendment, Mr. Sasscer stated (89 Cong. Rec. 6888):

"* * * Some of this temporary housing, as many of us know, is located in sections where it is not particularly wanted, but the communities accepted it in furtherance of the war effort. It is substandard, not in keeping with surrounding properties; and if, after the war, it is not taken down, it will become more substandard, detrimental to values of surrounding properties, and in many instances might, as was the case after the last war, become ghost cities or possibly be sold to bargain-hunting private investors and rented as substandard properties out of keeping with the surrounding homes or carried on permanently as a Government-owned housing proposition which is contrary to the intent of the Congress. * * *"

See also: 89 Cong. Rec. 6873, 6886; 96 Cong. Rec. 3159, 3216; *Shanks Village Residents Association* v. *Cole*, 219 F. 2d 28, 30 (C. A. D. C. 1955), certiorari denied, 349 U. S. 906, where the Court stated with reference to this same statute: "Throughout consideration of the bill Congress evinced a strong purpose to eliminate this temporary housing and to get the Government out of the business of maintaining and renting it"; and *United States* v. *Certain Parcels of Land in Cheyenne*, 141 F. Supp. 300, 304 (D. Wyo. 1956), where the Court stated with reference to temporary housing: "* * * it was the announced policy of Congress with respect to such housing that it should be removed or otherwise disposed of as promptly as practicable and in the public interest, 42 U. S. C. A. secs. 1524, 1541, 1584 * * *."

> the provisions of said contract, and all of them, and particularly those relating to removal of said buildings and site clearance, are clear, definite and unambiguous, and that said contract is fair, equal and just, not only in terms but in circumstances * * *.

All of the appellants had full and complete knowledge of the contract obligation that the buildings in question be removed from the site and that the parcels of land upon which they were located were held for the exclusive use of the United States (Fdgs. IV, XIII, XIV; R. 64–65, 71–72). Indeed, before acquiring their respective interests and "well knowing of the contract obligation of the Century Investment Corporation to remove said buildings from site" the appellants had endeavored to secure some express waiver of that contract obligation but were unsuccessful in such effort (Fdg. XV, R. 72–73).[9]

Also, despite the fact that it had been and was continuing to make conveyances of some of the buildings without imposing the required condition that they be removed from the site (Fdgs. X, XI; R. 60–70)—

---

[9] There is every indication that under the instruments here involved (R. 10–20), title to the temporary buildings could not pass to the removal contractor [Century Investment Corporation] unless the temporary buildings were actually removed. In any event, in view of the concert of wrongful action on the part of the appellants, if there is any "reverter" in this case it should be to the Government. Cf. Barnett Br. 20–29. Under equitable principles, in the circumstances here disclosed by reaffirmed findings of the district court (Fdgs. IV, XIII, XIV, XV; Supp'l. Fdg. VII; R. 64–65, 71–73, 110) any interests "purportedly acquired" (Fdg. XI, R. 68–70) by the appellants should be held to have been in constructive trust for the United States. Cf. *Angle* v. *Chicago, St. Paul &c. Railway*, 151 U. S. 1, 24–27 (1894).

a matter which the district court expressly found to be "contrary to the spirit and plain meaning" of its contract with the Government—appellant Century Investment Corporation sought an extension of time for removal of the buildings (Fdg. IX, R. 67–68).[10] These facts alone constitute misrepresentation by part of the appellants. And it appears that the misrepresentation was deliberate since the letter from Century requesting the extension of time stated, *inter alia,* "The Boiler rooms have been sold and the contractors are now tearing them down as fast at [*sic*] possible" (Pl. Exh. 9, *infra,* p. 41).

Based on the facts of this case, the district court determined that the appellants are not bona fide purchasers for value (Concl. X, R. 77–78). This conclusion is fundamental in the case. The appellants are seeking to retain their profits realized as the result of their own wrongdoing. The district court, in the exercise of its equity powers, properly did not permit them to do so since "The rule of equity is very broad to prevent a fraud, which would exist if one was permitted 'to derive a benefit from his own breach of duty and obligation.' 2 Story Eq. Jur. Sec. 781. * * *" *Carpenter* v. *Providence Washington Ins. Co.,* 4 How. 185, 223–224 (1846). And "it is

[10] While the Housing Authority of the City of Seattle had knowledge that buildings 102 and 103 were being offered for rental, on site, the Public Housing Administration did not. All of the appellants who dealt with the Housing Authority of the City of Seattle "knew, and now knows, that said organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America" (Fdg. VIII, R. 67). (The limited role of the Seattle Housing Authority in this matter has already been noted, *supra*, pp. 6–7, fn. 5.)

contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts." *Angle* v. *Chicago, St. Paul &c. Railway,* 151 U. S. 1, 25 (1894).

It is, of course, a long accepted maxim that where there is a wrong there is a remedy. The appellants Century and Pague contrived a scheme to circumvent a statutory requirement which was expressly designed for the safety and well-being of the public (fn. 8, *supra,* p. 15) despite the fact that it necessitated the breach of a contractual obligation by them to do so. As shown (*supra,* p. 16) the other appellants all had "full and complete" knowledge of the obligation and so knowingly participated in the scheme. Thus there were clearly "wrongs" by the appellants in the instant case. The remedy accorded by the district court in the exercise of its equity powers should not be disturbed.

Before leaving this point it should be noted that some of the appellants (Barnett, Owens, Ester and their wives) acknowledge that the judgment is good against other of the appellants, i. e., Virgil J. Pague and Century Investment Corporation (Barnett Br. 38. Cf. Barnett Br. 16). However, the former group of appellants seeks to escape any liability. Thus they argue, *inter alia,* "It is not alleged, and it is not proved, that Barnett, Owens and Ester are parties to the contract for a breach of which damages are assessed. No other theory of liability is alleged or proved" (Barnett Br. 37–38). Earlier they had similarly alleged (*ibid.,* p. 28): "Nowhere in the Find-

ings is a determination made that Barnett, Owens and Ester were parties to the contract upon which this action is based."[11] But, this case is not a legal action for breach of contract. Rather it is a proceeding seeking equitable relief. And, contrary to the impression sought to be given by them, the Findings expressly state that these appellants had "full and complete" knowledge of the violation of the Government's rights (R. 71–73). As the district court held (R. 77–78), these appellants are not "innocent purchasers." With full knowledge they voluntarily joined Century and Pague in violating propery rights of the United States arising from contract which was made pursuant to the express direction of Congress.

In these circumstances the district court properly held all of the appellants responsible in damages to the United States. In the exercise of equitable powers courts "are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."[12] *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 245–246 (1933). Though it did not ultimately decree the specific performance sought by the Government, in the exercise of its equity powers the district court did properly prevent the appellants from unjustly enriching themselves and receiving

[11] A similar allegation is also contained in their specifications of errors, *ibid.*, p. 4.

[12] This also serves to dispose of the contention that the court was bound to base damages on expenses incurred by the Government as a result of failure by the purchaser to abide by the terms of the contract (Century Br. 13). For the complete answer to the contentions concerning the "Contracting Officer" paragraph in which this expense formula appears, see *infra*, pp. 23–26.

windfalls through their own wrongdoing in knowingly violating rights of the Government. The appellants would have this Court upset that equitable result. But, as shown herein, there is no warrant for doing so and, additionally, federal courts have long refused to be made an "abetter of iniquity" (*ibid.*, at p. 245). Moreover, the wrong of appellants and the consequent right of the United States to some remedy is clear. If it should be determined that the remedy now given by the district court, i. e., damages, is inappropriate, it would follow that the only other available remedy, i. e., compulsory removal, should be decreed for this statutory and contractual violation.[13]

II. The damages awarded in lieu of specific performance were not excessive

Under the direction of the district court, a Special Master appointed by it made a complete accounting of all revenues received from and current operating expenses incidental to the commercial use by appellants of the property involved to determine the monetary damages sustained by the appellee. Rather than being prejudicial to the interests of the appellants, the damages awarded by the district court based on the findings of the Special Master are particularly favorable to them. This is so since items for which the defendants below (appellants herein) were prop-

[13] The United States did not ask the court to re-examine the question whether the federal district court in the locality involved erred in determining that the remedy of damages was more appropriate under all the circumstances. Appellants having brought the matter before this Court, the lack of an appeal by the United States should not preclude the granting of whichever remedy this Court might deem appropriate.

erly liable in damages to the United States were not charged against them. Thus, there is not included in the damages any sum which represents the value of the interest of the Government in the buildings, any profits received subsequent to November 16, 1955, any sum to reimburse the Government for its deposits for annual rentals arising solely because of the continued use by the Government of the underlying land necessitated by the willful failure of the appellants to remove the buildings, or any sum which represents the Government's obligation to pay to the owners real estate taxes on the underlying land.

The latter two obligations arise under Civil 1143, the condemnation proceedings in the same district court. See *supra,* pp. 9–10. And, incidentally, these expenses alone, which were caused solely by appellants' wrongdoing, disprove appellants' allegation that there was no proof "that any actual damage was suffered or expense incurred as a result of the breach of contract in this case, or as the result of the occupancy of the property to which the government claimed a leasehold by the defendants" (Century Br. 16). Moreover, as discussed *infra,* p. 22, since the appellants did not see fit to bring up all of the evidence adduced below, they are not in a position to allege a failure of proof. And, it is, of course, readily apparent that the United States would have received far higher bids for the buildings involved if the contract which it offered had not required removal from site. It has been estimated that absent the removal requirement bids would have been at least five times as much for any building and this is necessarily so

since bids based upon removal would represent little more than salvage value.

Further, since the necessity for incurring the Master's fee was entirely due to the wrongdoing of the appellants, the full cost of that expense should have been charged to them as defendants below rather than one quarter being taxed against the United States. Inasmuch as this is an equity action and the amounts adjudged rather than being unfair to the appellants are in fact favorable to them, the judgment should not be disturbed.

III. The findings by the District Court which are challenged by the appellants are not clearly erroneous and so should not be disturbed on appeal

Appellants attack the court's findings as to the amounts of monetary damage but do so without having designated or brought before this Court all of the evidence in the case. At the trial of this case, as noted by the court below, witnesses were sworn, testimony taken, and evidence adduced (R. 115). And, as discussed in Point II (*supra,* p. 20), a Special Master appointed by the district court made a complete accounting in this case. Upon that basis the amounts of the awards were determined. Objections to the reports of the Special Master (R. 91–105) were not sustained and the work of the Special Master was approved and confirmed by the District Court (R. 107, 115, 119). A motion to alter or amend the judgment and decree of the district court (R. 118) was denied (R. 119). It is submitted that in these circumstances an appellate court should not hold findings of a trial court so "clearly erroneous" as

to warrant reversal. Rule 52 (a), Federal Rules of Civil Procedure.

Some of the arguments by the various appellants have already been answered in the preceding points. And, we have shown in Point I, *supra,* pp. 13–20, that in general appellants' contentions must fall when the equitable nature of the case and appellants' position in the litigation are considered. We will now show briefly the fallacies and want of merit in other specific arguments advanced by the appellants.[14]

A. *The attempt to support error on the lack of a determination of damages by the Government's Contracting Officer is obviously fallacious.*—The provision referred to by appellants Century Investment Corporation and Virgil J. Pague (Century Br. 10, 11, 12–16) on its face is a provision binding on the Purchaser [Century Investment Corporation or its alter ego, Virgil J. Pague] (R. 13–14). It does not purport to be a limitation on the Government.[15]

---

[14] Insofar as appellants attack the amount of the fee allowed the Special Master (Barnett Br. 44–45), that is a matter primarily between them and the Master. Any possible change in that portion of the judgment should not in any event affect the other amounts awarded against the appellants.

[15] It strikes us as strange that appellants would be urging the exercise of the provision for determination of damages by the contracting officer since such a determination would be binding upon them. *United States* v. *Wunderlich*, 342 U. S. 98, 100 (1951); *Reed* v. *Murphy*, 232 F. 2d 668, 672 (C. A. 5, 1956); *United States* v. *United Enterprises*, 226 F. 2d 359, 363 (C. A. 5, 1955). While the scope of the *Wunderlich* decision was limited by statute, the limitation went only to a determination which was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. sec. 321. Any other factual determination, such as the amount of damages

Though it is submitted that what has just been said disposes of this argument, the circumstances of this case made it particularly appropriate for the Government to rely on the court to determine the damages. As has been shown (fn. 8, *supra,* p. 15), federal officials are under a mandatory congressional requirement to remove buildings such as here involved. Accordingly, the Government sought primarily to have that requirement enforced rather than to recover damages. Also, the Government did not undertake to exercise the "self-help" provision (Par. 6 of General Conditions, R. 16), i. e., to remove the buildings and charge the cost of such removal to the purchaser, because misrepresentations and acts by the appellant Century Investment Corporation brought about a situation where such action was inadvisable.[16]

---

occasioned by a failure to comply with the terms of a contract, made under a provision of a contract entered into by the United States is "final and conclusive." *Ibid.*

[16] As some of the appellants recognize, the Century Investment Corporation was, in substance, Virgil J. Pague, its promoter. Thus, they state (Barnett Br. 16) :

"Findings of Fact III, IV and V (R. 64–65) conclusively show that A. E. Sherman was the alter ego of Virgil J. Pague. Consequently, for all damages which may be due plaintiff, Century Investment Corporation, A. E. Sherman and his alter ego, Virgil J. Pague, are solely liable as parties to the contract. As a matter of fact, since it clearly appears by paragraph VI of the findings (R. 66) that there was no such "person" as the Century Investment Corporation at the time the assignment was made to it by A. E. Sherman, this would mean that the original party liable on the contract was Virgil J. Pague, as the principal of A. E. Sherman."

In the light of the above statement and, particularly, finding of fact IV, R. 64–65, compare the allegation in the other brief for the appellants that "Defendan Pague in this case was not a party to the contract, and so any damages against him must have been

Thus, in violation of its contractual obligations, Century had purported to convey to the remaining appellants and others interests in the building here involved. (See *supra,* pp. 4–5, for factual details.) And, on the grounds that such time was necessary "so that we may complete our cleaning the grounds and finish removing the houses that have been sold" (Pl. Exh. 9, *infra,* p. 41), Century prevailed upon the Seattle Housing Authority to purport to authorize an extension of time for performance under the contract. While federal officials believed, and the Court ultimately found (Fdg. VIII; Concl. V; R. 67, 75), that the limited authority granted to the Seattle Housing Authority was not broad enough to authorize it to waive any of the terms and conditions of the contract, a cloudy legal situation had thus been raised and the rights of third parties who were claiming to be bona fide purchasers had become involved. It was not until the trial that it was proved that these parties, including the non-corporate appellants herein, were not "innocent purchasers" (R. 77–78). In these circumstances, the Government's reliance upon the courts rather than self-determination was clearly appropriate.

Moreover, the record does not indicate that this contention was ever raised in any of the proceedings below. Obviously, if it had been, a simple answer would have been for the government agent to make the determination which would, in all probability, have exceeded the amount of the judgment by in-

---

based upon a trespass or unauthorized use of government property" (Century Br. 19).

clusion of items which might have been awarded (*supra,* pp. 20–21). Appellants should not, we submit, be entitled to seek a reversal upon an alleged error which could have been so easily cured had it been raised below.

B. *Appellants' argument that the court erred in ordering an accounting (Century Br. 18–33) and their challenge of the Special Master's work (Century Br. 39–44) contain many fallacies and do not warrant reversal of the judgment entered by the district court.*— As outlined in the Statement of Facts (*supra,* pp. 8–9), in this equity proceeding the Court itself desired further information concerning the question of damages. It determined that since there was evidence that appellants made commercial use of the buildings, and such use was carried on by the appellants from the sites from which they were obligated to remove the buildings during the period complained of, an accounting was in order (Oral Decision, *infra,* pp. 39–40). As has been pointed out (*supra,* p. 19) by quoting from the Supreme Court, courts of equity "are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, 245–246 (1933). Indeed, the ordering of an accounting is a common tool employed by courts of equity.

The appellants' argument that the transaction concerning the buildings was "one of sale" (Century Br. 21) gets them nowhere. (In this connection see fn. 9, *supra,* p. 16.) In addition to the fact that "the offsite removal was an incident" of the trans-

action as there admitted (*ibid.*), the contract involved went only to the buildings and did not involve the underlying lands for which the Government had the exclusive use through June 30, 1956. Appellants' attempts to confuse that issue must also fail. The President by Proclamation 2974 of April 28, 1952, 66 Stat. C31, C32, and Congress in the Act of July 3, 1952, 66 Stat. 330, 332, continued until April 1, 1953, the emergency declared by the President on September 8, 1939, for the purpose of continuing the use of property held by the Government under the Lanham Act, 54 Stat. 1125, as amended, 42 U. S. C. 1521 *et seq.* July 1, 1953, was substituted for April 1, 1953, by the Act of March 31, 1953, 67 Stat. 18. Three years after July 1, 1953, is July 1, 1956.[17]

And it is too late in the day for any credence to be placed in appellants' reliance upon the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, as terminating the national emergency here involved for the purposes of this case (Century Br. 27, 28, 32). The Supreme Court, this Court, and other courts have repeatedly rejected that contention. *Woods* v. *Miller Co.,* 333 U. S. 138, 140, fn. 3 (1948) (noting that, on the very occasion of his approval of the 1947 Joint Resolution, the President said: "The emergencies de-

[17] By appropriate notices filed in the condemnation proceedings (*United States* v. *Certain Parcels of Land in King County, Washington, et al.*, Civil No. 1143, United States District Court for the Western District of Washington, Northern Division), the temporary use of the United States in the underlying lands was terminated as of June 30, 1956. See *infra*, p. 40 where the District Court expressly found that the emergency involved existed "at all times material to this action".

clared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency power"); *Werner* v. *United States,* 233 F. 2d 52, 54–55 (C. A. 9, 1956), certiorari denied, 352 U. S. 842[18]; *United States* v. *Certain Parcels of Land in Potter Tp.,* 102 F. Supp. 691, 695 (W. D. Pa. 1952) (rejecting the proposition appellants assert here with the sufficient answer that in the Joint Resolution of July 25, 1947, Congress "was not terminating the national emergency as defined in leases or condemnation petitions by which the land on which the projects were located were acquired * * *").

[18] As this Court and counsel for the Government have particular occasion to know, the *Werner* case, *supra*, cited Century Br. 32, affords no comfort to the appellants here. That case did not involve the express exception contained in Presidential Proclamation 2974 of April 28, 1952, 66 Stat. C31, which provides for the continuing use of property held under the Lanham Act. The proclamation specifically provided (66 Stat. C32):

"* * * and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82d Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended [the Lanham Act]." Thus the "*existing* national emergency" (Century Br. 26), i. e., the emergency declared September 8, 1939, was expressly proclaimed to be in continuation for the purposes presently involved. As acknowledged by appellants (Century Br. 26) under judgments entered in the condemnation proceedings the Government's tenure was extendible for three years after the termination of the existing national emergency. As shown in the text above, the date of such termination was July 1, 1953, and three years thereafter was July 1, 1956. Thus no constitutional problem arises since Congress did not pass an act taking property beyond the tenure fixed by the court. Cf. Century Br. 30.

In this connection the appellants refer to their tenure in the street area after December 9, 1953 (Century Br. 23). Since this is an equity proceeding (R. 74), it should be noted that the appellants secured their interests in the streets as part of their scheme knowingly to violate the statutory and contractual obligation to remove the temporary housing here involved. This is amply reflected by Finding XV, R. 73. Thus "before acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff [United States]," the appellants endeavored to secure some express waiver of the obligation to remove the buildings (Fdg. XV, R. 73). They were unsuccessful. Then, after purporting to acquire their respective interests "and in an effort to secure" the express waiver of the contract obligation, the appellants secured permission of the City of Seattle to remain on the site and action of the Seattle Board of Public Works granting them the use of the street area (*ibid.;* see also Oral Decision, *infra,* p. 38).

Certainly the fact that, being unable to secure the waiver from anyone connected with housing matters, the appellants had prevailed upon the Seattle Board of Public Works to grant them use of the street area adjacent to the land underlying the buildings, which land had purportedly been conveyed to them in furtherance of their plan (see also Fdgs. XI, XII; R. 68–71), gives no support to appellants' allegation

that the court erred in ordering an accounting in this equity proceeding.

Similarly, the fact that appellants had acquired interests in the underlying lands accords no support. Cf. Century Br. 23; Barnett Br. 19–29, 32–38. As the record makes clear "none of the defendants [appellants] herein possessed an interest in said lands at the commencement of said [condemnation] proceedings, they having acquired their respective interests after the date of the contract sued upon in this action" (Fdg. XII, R. 70–71) and they "purportedly acquired" (Fdg. XI, R. 68–70) their interests with "full and complete knowledge" of the obligation to remove the buildings (Fdgs. XIII, XIV; R. 71–72).

Not only do appellants challenge the propriety of the district court's order of an accounting but some of the appellants urge at length that this Court review the reports of the Special Master (Barnett Br. 39–44). But since hearings were had and evidence was adduced before the Special Master, including sworn statements by certified public accountants (see, e. g., first page of Supplemental Report of Special Master forwarded to this Court as item 107 in the Certificate of the Clerk of the District Court (R. 133)) the findings of the Special Master were supported by substantial evidence. And the findings of a master confirmed by the district court wll not be disturbed when based on evidence. *Stonesifer* v. *Swanson,* 146 F. 2d 671, 672 (C. A. 7, 1945), certiorari denied, 325 U. S. 880, rehearing denied, 326 U. S. 805. There the Court stated:

> This is not a trial de novo. The respect which we entertain for findings made by the

> trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made.[19]

Indeed, the well-nigh conclusive nature of concurrent findings of a special master and the court has frequently been stated. See, e. g., *Cooper* v. *Brown,* 126 F. 2d 874, 879 (C. A. 3, 1942); *Frank Adam Electric Co.* v. *Colt Patent Fire A. Mfg. Co.,* 148 F. 2d 497, 499 (C. A. 8, 1945); *Parker* v. *United States,* 126 F. 2d 370, 376 (C. A 1, 1942); cf. *Prentice* v. *Boteler,* 141 F. 2d 175, 176 (C. A. 9, 1944); *Boyce* v. *Chemical Plastics,* 175 F. 2d 839, 841 (C. A. 8, 1949), certiorari denied, 338 U. S. 828. In *Cooper* v. *Brown, supra,* which involved an accounting situation, the court stated (126 F. 2d at p. 879):

> The master and the trial court having concurred upon conflicting evidence in the finding of fact with respect to the income received by the defendant, confirmation of the finding by

[19] Similarly, the Court stated in *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 695 (C. A. 2, 1944), certiorari denied, 323 U. S. 726: "Nothing is left to this appeal but, in effect, a request to us to conduct a trial de novo. This we cannot do. The trial court's determination of the facts must stand unless it is unsupported by substantial evidence (citing authorities in footnote). We see no warrant for reversal on that score." And in *Seagram-Distillers Corp.* v. *New Cut Rate Liquors*, 221 F. 2d 815, 820 (C. A. 7, 1955), the Court stated: "We are not permitted to substitute our opinion for the finding of the district court where, as here, the record furnishes a reasonable basis for its findings and action." Other cases have made clear that "It is not the function of an appellate court to assume the powers of the trial court" or to try the case *de novo. Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, 83 (C. A. D. C. 1944); *Empire District Electric Co.* v. *Rupert*, 199 F. 2d 941, 945 (C. A. 8, 1952), certiorari denied, 345 U. S. 909; *Ralston Purina Co.* v. *Novak*, 111 F. 2d 631, 634 (C. A. 8, 1940).

an appellate court necessarily ensues. *In re Ackerman,* 2 Cir., 297 F. 224; *Wootton Land & Fuel Co.* v. *Owenbey,* 8 Cir., 265 F. 91, 97.

C. *The district court's supplemental findings and conclusions do not require a reversal of the judgment which it entered.*—The appellants argue (Barnett Br. 9–29; Century Br. 23–25) that the judgment is not supported by the findings and conclusions of the district court. The asserted ground is that the United States lost its tenure in the lands underlying the buildings because of alleged failure to pay the compensation prescribed in the condemnation proceedings.[20] There are simple answers to any such contention. First, even if the United States had no adjudicated right to the land, it could not be ousted from its possession and use. The only remedy of anyone having interests in the property would be a suit under the so-called Tucker Act.[21] Second, this

[20] Rentals had regularly been paid or deposited in the registry of the court. The only thing upon which appellants base this argument is the tax situation discussed *supra*, pp. 9–10, and as to that matter administrative procedures had been established to pay the taxes in an orderly manner as they were lawfully levied and assessed.

[21] It is established law that the Government may "take" property in the exercise of the power of eminent domain without formal condemnation proceedings being filed, and that in such event the landowner's remedy is a suit under the so-called Tucker Act on the theory of implied contract, the recovery being the same as though a condemnation proceedings had been filed. *Campbell* v. *United States*, 266 U. S. 368, 370–371 (1924); *Hurley* v. *Kincaid*, 285 U. S. 95, 103–105 (1932); *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21–23 (1940); *Causby* v. *United States*, 328 U. S. 256, 267 (1946). And such possession may be taken even when the court has refused in condemnation proceedings to enter an order of possession. *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324 (C. A. 9, 1944).

argument by the appellants fails since it is but a collateral attack on the condemnation proceedings, an entirely separate action. Third, and more important, the district court did not here purport to hold that the United States had lost its tenure in the land. In the condemnation proceeding itself—which would be the only appropriate place for such an order—the court did not at any time rule that the Government's estate terminated earlier than June 30, 1956, by virtue of any failure to deposit in advance funds to cover taxes as they were lawfully levied and assessed or for any other reason.[22] Nor did the court so rule in the instant case. Rather, for reasons which will be explained hereinafter, the district court simply found that because of a failure to prove that "the future ascertainable installments" of just compensation had been paid, it would not accord to the Government the requested order that the defendants be specifically compelled to remove the buildings and clear the sites (Supp'l Fdg. II, R. 108). It was by no means a finding that the Government's tenure had been lost or that the Government was not entitled to relief for the wrongs committed against it by the appellants.

The district court was faced with a difficult factual situation. The appellants had knowingly violated rights of the Government and it was clearly entitled to a remedy. However, the fact remained that—while it had been done in spite of the removal requirement—the buildings had been improved, the United States was about ready to terminate its temporary use, the

[22] The termination as of June 30, 1956, was by appropriate notices filed by the Government in the condemnation proceeding.

City Council of Seattle had approved use of the buildings on site for rental purposes for five years from October 1, 1953 (R. 53), and the effect on tenants and the local community was to be considered. In the exercise of its equity powers the district court determined that it would be more practical to award damages than to require removal of the buildings (see Supp'l Fdg. III, R. 108–109).

It is submitted that the result reached by the district court is more than fair to the *appellants.* They should have been required to remove the buildings in accordance with the law and contractual obligations. For reasons heretofore explained, the Government has not prosecuted an appeal in this case. But, in the exercise of its equity powers, should this Court take any action other than affirmance of the judgment below, it should be to require removal of the buildings in compliance with the mandate of Congress and the contractual obligations undertaken in this case.

D. *The argument by appellants Barnett, Owens and Ester (Barnett Br. 29–38) that the district court erred in denying dismissal as to them is clearly without merit.*—As noted by these appellants (Barnett Br. 29), the district court denied motions alleging a failure to state and to prove a claim against them. Those motions were properly denied. In this respect, as in others, appellants ignore the nature of the case. It is not an action at law for a breach of contract as they would have it appear. Rather, as the court below makes clear (R. 74), it is an equitable proceeding by the United States seeking remedy for "open and flagrant" (R. 7) violation by the appellants of

rights of the United States, statutory and contractual. As shown by the findings, *all* of the appellants knowingly violated these rights of the Government with "full and complete" knowledge of them (Fdgs. XII, XIV, XV; R. 71–73). As also there shown, they not only knew of the requirement for removal of the buildings but they contrived an elaborate plan to circumvent the requirement. See also *infra,* page 38. The powers of equity are great. See cases cited *supra,* pp. 17–18. Appellants Barnett, Owens and Ester were joint actors with appellants Century Investment Corporation and Virgil J. Pague in the violation of the Government's rights. They were made parties to this equitable action and the district court properly declined to dismiss them.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.
CHARLES P. MORIARTY,
United States Attorney,
Seattle, Washington.
JOHN A. ROBERTS, JR.,
Assistant United States Attorney,
Seattle, Washington.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice, Washington, D. C.

JANUARY 1957.

APPENDIX

Oral Decision

This matter having come on for hearing before the Honorable John C. Bowen, Judge of the above-entitled Court, on Wednesday, September 7, 1955 at 2:00 P. M., plaintiff, the United States of America, represented by its counsel, John A. Roberts, Jr., defendant appearing by counsel Lyle Iverson for Century Investment Corporation and Virgil and Carl Pague, Gerald Shucklin for Geneva L. Pague, Malcolm McLeod for Hartford Accident and Indemnity and A. E. Sherman, Alex Duff and Arthur G. Barnett for defendants Owens and Barnett, Morris A. Robbins for Ester, all parties having been heard and all parties having rested, the Court, being fully advised on the premises, thereupon rendered the following:

ORAL DECISION

The Court. From the preponderance of the evidence in this case the Court finds, concludes and decides that although the plaintiff did give to Mr. Michaelson, an employee of the Seattle Housing Authority, a limited, specially appointed agency and authority to do certain specified things in connection with the letting of the contract which resulted in the purchase and sale by the defendants Pague and Century Investment Corporation, there never was any general agency from the plaintiff to Mr. Michaelson with powers broad enough to generally authorize Mr. Michaelson to waive any of the terms and conditions of the contract of purchase and sale referred to between the plaintiff's agencies and the defendants Pague and Century In-

vestment Corporation. By the use of the term or phrase "defendants Pague and Century Investment Corporation" I mean, in particular, Century Investment Corporation—at the time the contract was entered into. Pague was one of the moving spirits whose activities, in part, were looking forward, at that time, to the incorporation of the defendant Century Investment Corporation.

That incorporation was later accomplished, and the acts of Pague and Sherman in behalf of the Century Investment Corporation, Inc., to be later formed, were authorized by Century Investment Corporation later. That corporation became connected with the purchase and sale here in question. More particularly, it became interested in all of the acts and things done by Mr. Pague and Mr. Sherman respecting these buildings, and became bound on this contract of purchase and sale;

That by their acts and deeds complained of in this action, and particularly, by not removing the buildings here in question from the site on which they were used by plaintiff or its Public Housing Administration, and as alleged in all of the things done and omitted by the defendants in connection with failure to remove the buildings, as required by the contract, the defendants breached the terms of the alleged contract, and plaintiff is entitled to have specific performance of it because of the extreme importance of the conditions and objects of the contract, all of which necessitate that the buildings be removed and that the contract be otherwise performed.

The Court further so finds, concludes and decides that defendants' failure to comply with the contract and remove the buildings constitutes an irreparable injury, because it enabled the defendants, and each and all of them, to operate the buildings in question

on the site where they were first constructed as commercial buildings, as rental housing units, and for other commercial purposes, as to which the plaintiff was, and still is, without an adequate remedy at law to obtain redress for such breaches of the contract of purchase and sale;

That the defendants, other than Pague and Century Investment Corporation, are liable to the plaintiff in this action, and against them the plaintiff is entitled to the same relief as the Court has just announced the plaintiff is entitled to against the defendants, Pague and Century Investment Corporation, because the other defendants other than Century Investment Corporation and Pague, acquired no better title to anything than that which the defendant, Century Investment Corporation and the defendant Pague, themselves had; that they actually knew, so the Court finds from the preponderance of the evidence in this case, before they acquired their presently asserted interests, of the limitation of right of the purchaser of the buildings and that the buildings were to be removed from the property. That, of course, is unmistakably manifested by the actions taken by these defendants purporting to purchase from the defendants Pague and Century Investment Corporation, in their taking steps to obtain a resolution from the City Council and in discussing the conditions involved with Mr. Michaelson, and trying to get, through him, some express waiver of this contract obligation, requiring the purchaser to remove the buildings from the site where they were when the contract was entered into.

From the preponderance of the evidence the Court finds, concludes and decides that, as to the defendant Hartford Accident and Indemnity Company, its suretyship liability on the performance contract was ended when the time of contract performance was

extended by plaintiff without the consent and approval of the surety Hartford Accident and Indemnity Company; that such time extension was a material increase by plaintiff of the risk assumed by the defendant surety, and it was a material breach of the terms and the conditions of the contract;

That defendant is not liable for the further reason that the obligee under the bond was neither the plaintiff nor any agency of plaintiff, but was "Housing Authority, City of Seattle", and everybody connected with this case at the time that contract was made knew, and now knows, that that was a wholly different organization or agency from that of the Federal Public Housing Administration in whose behalf plaintiff maintains this action. There is no evidence of valid substitution of such Public Housing Administration or of the plaintiff as obligee in the bond.

Now, the Court wishes to refer to the issue tendered by plaintiff of an accounting. The Court does not feel that there is sufficient evidence adduced which would support the findings or decision one way or another on the question of whether or not, and if so, how much money, the plaintiff has been damaged up to this time in terms of dollars and cents, and I do not see how the Court could be fully and adequately advised of the amount of such damages unless the Court knew from proper evidence what the value of the use of the property has been during the time of the breach by the defendants of their obligation to remove these buildings, and a very substantial informative source of information would be the amount of money realized by these defendants in the conduct of commercial businesses in these housing units, while they were using them;

And so the Court finds, concludes and decides from the preponderance of the evidence, that since there

is evidence that such commercial use of the buildings was made by the defendants, and such commercial business was carried on by the defendants on the site from which they were obligated to remove the buildings during the period complained of, the plaintiff is entitled to a full and complete accounting of all the monies received and all expenses paid on account of any and all such commercial businesses so conducted by the defendants. The Court indulges the hope that plaintiff and defendants can agree upon the proper and necessary details of effecting that accounting so as to minimize, as far as possible, the expenses thereof, and also, the Court will hope that counsel can agree upon the time in which such accounting may be effected; also, the Court wishes counsel to further consider among themselves and recommend to the Court in future trial proceedings not later than the time to be appointed for the settling and entering of proper findings of fact, conclusions of law and decree, the time within which the Court should order the accomplishing of specific performance as to the removal of the buildings, the Court finding that at all times material to this action there existed the emergency during which, under paragraph number 3 in the judgment fixing compensation and directing funds to be paid in cause number 1143, the plaintiff had the right, under the decree, to renew the estate taken from year to year, and that plaintiff had such right by reason of the terms and provisions, particularly of joint resolution, being Public Law 450, Chapter 570, Act of July 3, 1952, set out in 66 Stat. 330, and also by virtue of the provisions of the joint resolution, being Public Law 12, Chapter 13, Act of March 31, 1953, 67 Stat. 18.

CERTIFICATE

I, Madeline Newell, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

(S) Madeline Newell,
MADELINE NEWELL,
Official Court Reporter.

Nov. 2, 1953.

MR. CHARLES W. ROSS,
Seattle Housing Authority,
825 Yesler, Seattle, Wash.

DEAR MR. ROSS: In regard to our telephone conversation of this date would you please consider granting us an extension of 60 days, so that we may complete our cleaning the grounds and finish removing the houses that have been sold.

The house movers have been very busy this summer and have been unable to deliver the houses as fast as we sell them. The Boiler rooms have also been sold and the contractors are now tearing them down as fast at [*sic*] possible.

Hoping you will grant this extension, I am,
Yours very truly,

CENTURY INVESTMENT CORP.,
(Signed) A. E. Sherman,
By A. E. SHERMAN.

[Plaintiff's Exhibit 9]

November 12, 1953.

Mr. A. E. Sherman for the
Century Investment Co.,
914 Dearborn Street,
Seattle 4, Washington.

Dear Mr. Sherman: Your request for an extension of time in which to complete your contract for the removal of buildings and for site clearance at WASH-45302 is approved not to exceed January 15, 1954.

Please be advised that because of the many requests from owners for the release of their properties, no extensions beyond this date will be possible.

We ask that you submit a report to us on December 15th, showing progress made and work still required for completion.

Sincerely yours,

J. R. Adams,
Acting Executive Director.

JRA: LM: dlc
cc to Virgil J. Pague

[Plaintiff's Exhibit 10]

U. S. GOVERNMENT PRINTING OFFICE: 1957